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Supreme Court of the United States

OCTOBER TERM, 1944

No. 537

GREAT AMERICAN INDEMNITY COMPANY,
Petitioner,

versus

LYMAN FLENIKEN, Et Al.,
Respondents.

FIRST SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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May It Please the Court:

Learned counsel for the respondents make the following statement on pages 9 and 10 of their brief in opposition to the petition of Great American Indemnity Company for a writ of certiorari, viz:

> "But subsequent to the hearing of this case on the first appeal by the Circuit Court of Appeals the Supreme Court of Louisiana declared the law of Louisiana to be such that petitioner under the terms of its policy would be liable as insurer of Ewell, and, therefore, liable regardless of whether or not Ewell was a servant of the Press. This law was announced in *LeBlanc vs. New Amsterdam Casualty Company*, 13 So. 2d 245. The opinion of the Circuit Court of Appeals, which petitioner asks Your Honors to review, mentions this *LeBlanc* case (R. 42). Had that case been decided and called to

> the attention of the Court of Appeals it would have been compelled to affirm the original judgment, because under the *LeBlanc case*, petitioner under the terms of its policy is the insurer of Ewell and proof of master and servant is unnecessary."

In reply we wish to state that the LeBlanc case was called to the attention of the Court of Appeals in respondents' motion to recall the mandate and grant a rehearing and the brief in support thereof, filed in the Circuit Court of Appeals for the Fifth Circuit on August 20, 1943 in No. 10,247 on its docket; in fact it was urged in the said motion and petition for a rehearing that because of the decision in the *LeBlanc case* a rehearing must be granted in the said appeal. Practically the same reasons (although in greater detail) that are now being urged in respondents' brief in connection with the *LeBlanc case* were urged in the said motion and application. The Fifth Circuit Court *denied* the motion and declined to reopen the case.

We submit that the Fifth Circuit Court of Appeals was correct in its refusal to reopen the case following the LeBlanc decision for these reasons:

(1) In the *LeBlanc Case*, counsel for the defendant conceded that the "accident was caused partly, if not entirely, by the negligence of Philip LeBlanc, plaintiff's husband, and that at the time of the accident, he was using his own automobile on the business of H. T. Cottam and Co., his employer." 13 So. (2d) 246. No such concession has been made by the defendant in this case, and the Fifth Circuit Court held that Ewell, the owner of the truck involved in this accident, was an **independent contractor** and was not an agent or servant of Capital City Press, defendant's assured, in the discharge of his duties at the time of the accident.

(2) The Supreme Court of Louisiana held that H. T. Cottam and Company had the power to exercise supervision and control over LeBlanc in connection with the operation of his automobile under its contract of employment with him, when the automobile was driven by him in the course and scope of his employment stating that "a mere reading of the contract will show that the Cottam Company had the right to control LeBlanc's every activity in connection with his employment. He was required to devote his entire time to his employer's business, subject to the direction and the rules and regulations of his employer." 13 So. (2d) 246, 247. Capital City Press neither had the right to control, nor controlled, the action of Ewell or of Neyland, the driver of Ewell's truck. Moreover, Ewell did not devote his entire time to the business of distributing newspapers, but in addition he distributed, by means of his automobile, bread baked by Wolf's Bakery, collected and delivered laundry for a local dry cleaning establishment, and occasionally delivered articles of merchandise for individual customers, all independent of any control by Capital City Press. Truly, he was an independent contractor.

(3) The policy in the *LeBlanc Case* was a "National Standard Automobile Liability Policy" with the "Employers' Non-Ownership Liability Rider" attached, whereas, the policy sued upon in the case at bar was a "Non-Ownership Automobile Policy" with schedule annexed. There are many different provisions in the two policies and the coverage is quite different.

We will not attempt to analyze fully the two policies but will content ourselves with pointing out only a few differences:

(a) In the National Standard Automobile Liability Policy involved in the *LeBlanc Case* the insurer agreed

under Coverage A "To pay on behalf of the **insured** all sums which the **insured** shall become obligated to pay by reason of the liability imposed upon him by law for damages * * *." In the case at bar the insurer agreed "to PAY all sums which the **Named Assured** shall become liable to pay as damages imposed by law * * *." **The named assured in the instant case is Capital City Press.** (Emphasis ours).

The word "insured" is not qualified in the LeBlanc policy, whereas, it is qualified in the Capital City Press policy.

(b) In the rider or schedule attached to the policy issued by the appellant it is provided that "The insurance applies only to the use, by any person of any automobile or motorcycle, of the private passenger type, in the business of the **named assured** as expressed in the declarations (newspaper business), and to the use in such business by any employee of the named assured, of any automobile of the commercial type if such use is occasional and infrequent." The Fifth Circuit Court having held that Ewell was an independent contractor, how can it be successfully argued that either Ewell or Neyland was using Ewell's car "In the business of the named assured (Capital City Press) as expressed in the declaration"?

(c) In the *LeBlanc Case* it was contended that the effect of the rider was to restrict the coverage of the policy to Cottam & Company only, but the Court held that **"the only effect is to change the coverage of the policy from the automobiles of Cottam & Company to those owned by its employees mentioned in the schedule attached to the policy** and to restrict the coverage to the business use of the automobiles. In other words, the so-called omnibus clause appearing in the original policy is modified to that extent **and the policy, as affected by**

the rider, does not cover any person using the various automobiles, but only those mentioned in the schedule. It does not extend to persons using the automobiles with the permission of the insured, the named insured or the unqualified insured, but it does cover each of the seventeen". 13 So. (2d) 247, 248. (Emphasis ours.) **Robert Neyland, the driver of the car involved in this accident, was not one of the persons named in the schedule attached to the policy. Hence, even if we concede that the policy covered the independent contractor, Ewell, (which we do not) under the decision relied upon by the plaintiffs, Neyland, the driver, not being mentioned in the schedule, was not protected by, and was not insured under, the policy.**

(d) In the *LeBlanc Case* each of the seventeen salesmen mentioned in the schedule was required to pay to the Cottam Company his pro rata part of the premium on the insurance policy, whereas, in this case the Capital City Press paid the entire premium due under the policy issued by the appellant."

(4) What the Louisiana Supreme Court said with reference to the coverage was dictum, because, as stated supra, it was conceded that at the time of the accident LeBlanc was using his automobile on business for the Cottam Company.

For the foregoing reasons we submit that the Court of Appeals for the Fifth Circuit was correct in refusing to reopen this case on the ground that the *LeBlanc case* changed the jurisprudence of Louisiana.

For the reasons stated in our petition for certiorari and brief in support thereof, we also submit that when the Court of Appeals for the Fifth Circuit held that "The motion of defendant-appellant (Great American Indemnity Company) for a verdict in its favor should have

been granted" and remanded the case to the District Court "for further and not inconsistent proceedings," it was the ministerial duty of the District Judge to grant petitioner's motion for a directed verdict and enter judgment in its favor, and the Fifth Circuit Court was in error in remanding this appeal to the District Court for further proceedings.

Respectfully submitted,

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